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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1209

LONG MFG., N.C., INC., *Petitioner,*

v.

SARAH HELEN WILLIAMS DOLLAR, and
NICHOLS TRACTOR COMPANY, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to view the judgment of a panel of the United States Court of Appeals for the Fifth Circuit, entered in this case on November 30, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 561 F.2d 613 and is reproduced in the Appendix to this petition beginning at page 1a. The Order of the Court of Appeals, denying Petitioner's motion for rehearing, was entered November 30, 1977. The denial of the motion for rehearing is reported at 565 F.2d 163 (table). By its opinion, the Court of Appeals reversed an order of the United States District Court for the

Middle District of Georgia granting a directed verdict for petitioner (as defendant) in a civil action for damages alleging "products liability" claims.

JURISDICTION

The order of the Court of Appeals from which review is sought was entered on November 30, 1977, and denied petitioner's motion for rehearing. The date of the original opinion of the three judge panel was October 21, 1977. This Court is vested with jurisdiction over this petition for a writ of certiorari under the provision of 28 U.S.C. §1254(1). Jurisdiction of the Trial Court was based upon diversity of citizenship.

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner (as appellee below) received proper and judicious appellate consideration of its legal position when the Court of Appeals, in regard to an interrogatory answer explicitly limited in scope to the only clearly relevant time period applicable, dismissed such explicit limitation as being "evasive" and prejudicially categorized petitioner's discovery participation as "Gamesmanship and Discovery."

2. Whether a Circuit Court of Appeals can properly displace the Trial Court's sound discretion regarding the control of pre-trial discovery by overruling the Trial Court's denial of a motion to compel, when (1) the motion to compel was not filed until the eve of trial, approximately one year after an allegedly "evasive" interrogatory response was filed; (2) th motion to compel seeks information that is at best ony arguably admissible; and (3) the Court of Appeals, in reversing the Trial Court, implicitly reverses the burden on appeal by requiring an affirmative showing of the propriety of the Trial Court's order rather than requiring the appellant to show prejudicial error.

3. Whether the Court of Appeals can usurp the Trial Court's control over the conduct of a trial and substitute its opinion for the discretion of the Trial Court, basing such opinion only upon assumed facts contrary to those shown by the record, and reverse the Trial Court when the Trial Court had excluded proferred evidence, ostensibly offered for impeachment, which (1) was not directed to any material issue; (2) was hearsay; (3) was not a prior statement of the witness testifying; and (4) was not inconsistent with the witness's testimony.

4. Whether the Court of Appeals may reverse a Trial Court's evidentiary ruling which denied an attempt to "impeach" a witness on a non-material point, when that reversal is predicated upon (1) an erroneous reading of the record and (2) a misreading and misapplication of Federal Rules of Evidence 403 and 407 by the Court of Appeals.

5. Whether the Court of Appeals can ignore applicable state law and trial testimony and rule, as a matter of law, in favor of a particular construction of a document which is contended to be a release by plaintiff of an alleged joint tort-feasor when (1) the document, although collusively styled as a "loan", obligated plaintiff to release the alleged joint tort-feasor upon conclusion of plaintiff's suit against petitioner and was accompanied by an insurance draft (for $40,000) bearing language that acknowledged that receipt of the draft was "full satisfaction" of the claims referenced on the face of the draft; (2) the evidence showed without equivocation that the liability insurer

treated the matter as a liability claim and not as a loan; (3) the documents, offered in evidence by plaintiff (respondent) were contradicted by the testimony of the plaintiff's witnesses; and (4) the petitioner was not a party to the agreement and was thus not barred from introducing parol evidence to show the collusive recitals to be untrue.

RULES AND STATUTES INVOLVED

1. Federal Rule of Evidence 403
2. Federal Rule of Evidence 407
3. Federal Rule of Evidence 613
4. Georgia Code Annotated Section 20-701
5. Georgia Code Annotated Section 20-909
6. Georgia Code Annotated Section 39-604

The text of the rules and statutes cited above will be found reproduced in the appendix, beginning at page 12a.

STATEMENT OF THE CASE

This petition for writ of certiorari arises from an action for damages filed in the United States District Court, Middle District of Georgia, in which jurisdiction was based upon the diverse citizenship of the parties and an amount in controversy alleged to be in excess of $10,000.00.

The claim in the main action was based in tort. Plaintiff's son was killed on June 13, 1972, while operating a tractor owned by his employer and manufactured by the John Deere Company. On July 24, 1968, the decedent's employer had bought a backhoe manu-

factured by petitioner Long, Mfg., N.C., Inc., a manufacturer of agricultural equipment (hereinafter described as "Long"). The backhoe produced by Long was removable and was designed to be mounted on agricultural tractors whenever use of the backhoe was needed. Almost four years after the backhoe was purchased, the decedent's employer purchased a "rollbar-canopy" from the Nichols Tractor Company, Inc., a dealership, when then installed this canopy on the tractor on April 26, 1972. Soon after the installation of the canopy on the tractor, the plaintiff's decedent was killed when, while operating the backhoe, he was crushed between a part of the canopy and a part of the backhoe.

After suit was filed against Long, as manufacturer of the backhoe, Long filed a third-party complaint against Nichols Tractor Company, the dealership which had sold to the decendent's employer and installed the canopy on the tractor in question. During the course of pre-trial discovery, it was learned that, prior to filing the suit against Long, the plaintiff had negotiated and received a substantial payment from the liability insurer of Nichols Tractor Company, based upon plaintiff's claim arising from the death of her son. As the plaintiff's lawyer testified at the trial, he had concluded, after an investigation of the incident, that there were ". . . two companies involved here, one was the John Deere Company, John Deere, and Nichols Tractor Company,—John Deere Insurance Company and Nichols Tractor Company and Long Mfg. Company." (T. 90). (John Deere Insurance Company was the liability insuror for Nichols Tractor Company.) Plaintiff's attorney then contacted counsel for the John Deere Insurance Company and arranged a "loan" with which to finance the lawsuit against Long.

While the documents effecting this transfer of money were titled as a "loan," it was clear that such descriptive language was self-serving and collusive for two primary reasons. First, the very language of the document and the obligations undertaken by plaintiff as a result of the payment were far more expansive than those entailed in a traditional covenant not to suit. Specifically, to insure that any future liability of the paying party was extinguished, plaintiff was obligated to execute any releases necessary and to satisfy, without further consideration, any judgment which plaintiff might obtain against Long and which Long might use as a basis for seeking contribution or indemnity against either the dealership (Nichols Tractor), the manufacturer of the tractor, the John Deere Manufacturing Company, or the dealership's liability insuror, John Deere Insurance Company. Thus, the liability carrier extinguished any chance of further recovery against it or its insured.

The second factor clearly proving the collusive and self-serving nature of plaintiff's attempt to call this settlement a "loan" was furnished by the evidence of a Mr. Loren B. Griggs, upon cross-examination. Mr. Griggs, the assistant claims manager of the John Deere Insurance Company, was called by plaintiff and testified upon cross-examination that the so-called "loan" was treated on the company's financial records as a payment on a casualty claim, that it did not bear interest, that it was paid only pursuant to the applicable insurance agreement as a result of a claim made regarding the insured and, finally, that it was the intent of the John Deere Insurance Company that the payment satisfy the claim arising as a result of the death of plaintiff's decedent. Furthermore, payment was

effected by a bank draft, which contained a legend reciting that endorsement of the draft was in full satisfaction of the identified claims; Mr. Griggs testified that the so-described claim was the one arising by reason of the death of plaintiff's decedent.

Indeed, the evidence which showed the payment in question to be a settlement and release a tort claim was so strong that plaintiff, as a part of the case in chief, introduced the pertinent documents and called as witnesses parties to the agreement in an attempt to negate the inescapable conclusion that a release had been finalized. This attempt was necessary, of course, because the substantive law of Georgia provides that the release of one who is an alleged joint tort-feasor extinguishes any claim which might be asserted.

At the trial of the case, much of plaintiff's evidence centered on plaintiff's attempt to circumvent the effect of a settlement with an alleged joint tort-feasor. Due to plaintiff's settlement of the claim against the dealership which had installed the rollbar-canopy in question, the plaintiff at trial attempted to show that the backhoe in question was defective or defectively designed in that parts of the backhoe could move, and, with the rollbar now having been added, press the operator against the rollbar. Of course, the rollbar was added subsequent to Long's manufacture of the backhoe, and it was installed by a party having no relationship with Long. In addition to the clear lack of evidence that Long should be charged with knowledge of the physical dimensions or limitations of the rollbar in question, the only testimony offered by plaintiff which suggested an explanation for the decedent's death came from a hired consulting engineer who obtained the desired results

only by unusual manipulation of the machine, in circumstances completely unrelated to normal usage.

Motion for directed verdict had been made by defendant at the close of plaintiff's case and at the close of all evidence. Both of these motions were taken under advisement. After extensive jury deliberation, the jury reported that it was deadlocked 11 to 1, with only 1 juror leaning toward a recovery by plaintiff, whereupon, the court directed a verdict for defendants.

In spite of the fatal weakness of plaintiff's claim, and the lack of any evidence which could be said to suggest a defect or defective design regarding the backhoe in question in the context of the use being made of it at the time of decedent's death, plaintiff appealed to the United States Court of Appeals for the Fifth Circuit, asserting several errors.

The Court of Appeals for the Fifth Circuit, incredibly, reversed. This reversal was based upon three separate grounds, which are enumerated in separate divisions of the court's opinion. Each of these three grounds deals with a matter wholly ancillary to the ultimate question of the propriety of the direction of the verdict. As indicated above, there was never introduced any evidence showing a defect in the design or manufacture of the backhoe with regard to its normal, intended use or its manner of use at the time of the incident in question. Thus, none of the three issues considered by the Court of Appeals warrants reversal, even if the appellate court's substitution of its opinions for the trial court's were proper.

The Court of Appeal's opinion must be reversed, however, for a far simpler reason: it is simply wrong in each of its three particulars.

Regrettably, it must be stated that the Court of Appeals misconstrued the record and, on the basis of the inaccurate assumptions set out in its opinion, misapprehended and misstated certain facts upon which its reasoning ostensibly turns. Moreover, and again regretfully, it is submitted that the court's reasoning is ill-considered and illfounded, as the court overlooked some authority and further based its decision, in part, upon a completely untenable reading of the Federal Rules of Evidence.

As indicated above, the court's opinion is divided into three sub-parts: "I Gamesmanship and Discovery;" "II Insulation from Impeachment;" and, "III Release or Covenant Not to Sue?" The factual fallacies, and contended errors of law, which invalidate the court's reasoning and the result reached regarding each of these three issues will be discussed, in order, as "Reasons for the Allowance of the Writ," *infra.*

Before discussing the reasons for granting the writ, however, it is appropriate briefly to note the trial context from which each of these three issues arose.

The first part of the court's opinion ("Gamesmanship and Discovery") concerns an interrogatory propounded by plaintiffs which was unrestricted in scope of time and sought information regarding incidents similar to the one at issue. Notwithstanding the general inadmissability of evidence regarding similar occurrences, defendant answered that interrogatory, indicating that there were no such incidents prior to the incident in question. The interrogatory response was explicitly and conspicuously focused upon the time frame prior to the incident in question, as there might arguably have been issues raised regarding notice of

an alleged defect by result of prior incidents. This interrogatory answer was filed in October of 1974, and plaintiff accepted this answer, without further discovery activity in this regard, for almost a full year. In mid-September of 1975, some 11 months later and with the trial date rapidly approaching, plaintiff obtained the deposition testimony of certain personnel of defendant Long. Upon the occasion of these depositions, when defendant again refused to provide information regarding any similar incidents subsequent to the date of this incident, plaintiff then elected to press this issue, by a motion to compel, which was filed only a few weeks before trial. Plaintiff's apparent reasoning was that plaintiff was not advised of the fact of any incidents subsequent to the incident involving plaintiff's decedent. It is of course uncontroverted, however, that plaintiff had been aware from the receipt of the defendant's original interrogatory answer that no information was being provided for the time period subsequent to the incident in question. Somehow, in spite of the explicit limitation that the answer given was restricted to the time frame prior to the incident in question, the Court of Appeals found this explicitly limited answer "evasive."

The second issue of concern to the Court of Appeals was subsumed under the heading "Insulation from Impeachment." With all due respect, it is in this section that the contended misreading of factual matters by the court is most glaring. During the depositions of personnel of defendant Long, plaintiff's counsel were informed of warning bulletins, dated March, 1975, which were sent to Long dealers as well as owners of Long backhoes; counsel were further informed that this letter was prepared under the direction of Long's

general counsel. Deposition of Max Saunders, pp. 76-77, 122. At the bottom of one of these bulletins was a simple notation, directing further questions to Mr. Max Saunders, the director of engineering for Long. Neither bulletin, in any way, stated or implied that Mr. Saunders was the author of the bulletin, as he in fact was not.

At trial, Mr. Saunders was cross-examined by opposing counsel and was asked to state his opinion regarding the safety of the backhoe at that time (i.e., date of trial). Mr. Saunders replied that, in his opinion, it was safe to operate the backhoe in question on a tractor with a rollbar, "if it is properly put on there." (T. 412) Upon eliciting this statement, opposing counsel sought to "impeach" Mr. Saunders, without laying any foundation, by introducing the warning bulletin previously sent out at the direction of Long's attorneys. When this document was offered for "impeachment," it was not contended that he was the author of this document but merely that the letter in question was one "bearing his name." (T. 425).

Apparently without carefully considering fully the applicable Federal Rules of Evidence, the Court of Appeals held that this letter should have been admitted for "impeachment"; without considering whether the document was in fact impeaching, and even in the absence of a proper foundation, the court apparently assumed that the letter was in the nature of a prior inconsistent statement. Notwithstanding the clear evidence that Mr. Saunders was *not* the author of the letter, the Court of Appeals referred ot this letter as one "sent to all Long backhoe dealers by the same Mr. Saunders," and as being Mr. Saunders' "own letter." 561 F.2d at 618. Upon motion for rehearing,

clearly pointing out this factual error, the Court of Appeals chose not to correct its misstatements of fact. Moreover, as will be pointed out later, petitioner respectfully contends that the Court of Appeals erroneously confused the standards regarding the admissibility of relevant evidence on material issues with the greater latitude allowed a trial judge in rejecting evidence, offered only for impeachment, regarding collateral matters.

In the final division of its opinion, "Release or Covenant not to Sue?", the Court of Appeals ruled that the trial court erred in submitting to the jury the question of the true intent of signatory parties and the effect of the settlement document and draft discussed above. As noted above, there was a complete discrepancy between the factual testimony at trial and the collusive recitals on the face of the document, which was entered into for the purpose of financing this litigation, and to which document defendant Long was not a party. Except for this one opinion from this Court of Appeals, defendant Long, as a non-party to the agreement, would be permitted to introduce parole evidence to contradict the agreement. As will be seen from a review of the record, this parole evidence clearly revealed the document to be just what it was: a collusive attempt by plaintiff, in conjunction with the insuror of an alleged joint tort-feasor, to extinguish her claim against that tort-feasor for a substantial sum of money and yet still retain the option of prosecuting this litigation in regard to the same claim.

In spite of this strong evidence, the Court of Appeals, contrary to the substantive law of Georgia, and decisions of other Circuit Courts of Appeals, held that the trial court should have ruled on the documents as a

matter of law. This holding is contended to be contrary to abundant factual evidence in the record and to the substantive law of Georgia applicable in this diversity action.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. The Court of Appeals, In Reversing The Trial Court, So Far Departed From The Accepted and Usual Course of Judicious Appellate Proceedings As To Require This Court To Exercise Its Power Of Supervision: The Court of Appeals Effected An Unwarranted and Indefensible Intrusion Into The Trial Court's Exercise Of Its Discretion Regarding The Control Of Pre-Trial Discovery.

As the heading of this section indicates, this court should review by the writ of certiorari the action of the Court of Appeals due to its departure from the accepted and usual course of judicious appellate proceedings. It is respectfully submitted that this departure was extreme and warrants this court's exercise of its supervisory powers. *See,* Rule 19, Revised Rules of the Supreme Court of the United States.

The first section of the court's opinion presents two issues which are identified above as Items 1 and 2 of the "Questions Presented for Review".

As set out in the "Statement of the Case," Long, as defendant below, answered an interrogatory response which was unrestricted in scope of time by explicitly limiting its answer to the period prior to the incident in question. As prior incidents are often permissably argued to afford notice of a given condition, it was manifest that the only clearly relevant time period for plaintiff's inquiry was for that time up to and including the incident in question. Defendant's answer was explicitly limited in scope to this time frame. The

plaintiff was satisfied with this clearly limited answer for a period of approximately one year. Under these circumstances, it is urged that no reasonable man could seriously contend that such an answer, with an explicit qualification, could be considered evasive. Indeed, plaintiff did not react to this limited response in any manner. After the lapse of one year, and as the trial date was approaching, plaintiff obtained the deposition testimony of certain employees of Long. Again, Long declined to respond except in regard to the time period prior to the incident in question. At this time, plaintiffs moved to compel.

The trial court, in a brief order, denied this motion to compel. (R-336). In view of the lengthy delay by plaintiff in moving to compel, it is submitted that the Court of Appeals begged the point by observing that there were no stated reasons for the order limiting the scope of discovery. 561 F.2d at 618. The delay of plaintiff was itself a sufficient ground for the denial of the Motion to Compel. *See, e.g.,* 4A *Moore's Federal Practice,* ¶ 37.02[6].

Indeed, the entire first division of the opinion by the Court of Appeals is remarkable. First, rather than considering that the burden is on the appellant to show harmful and prejudicial error, the Court of Appeals in effect now places the burden upon the Trial Court to justify its orders, otherwise proper but for this contrary opinion by a three judge appellate panel given under a literary heading opinionatively entitled "Gamesmanship and Discovery."

If this petitioner's approach to its obligation to opposing parties and the Trial Court can now be so lightly characterized as "gamesmanship," it certainly did not

appear that way to the trial court which was more directly involved with the conduct of pre-trial discovery and the trial itself. It is respectfully submitted that, upon reading by a non-involved party, such an opinion bespeaks a drastic departure from the detached objectivity which should characterize appellate proceedings and opinions.

Accordingly, on this basis alone, a review by this court under a writ of certiorari is appropriate.

Further, as noted above, the appellate court's conclusion that the answer was evasive is hardly supported by the record. The answer was explicitly limited to the only clearly relevant time frame. Plaintiff delayed almost one year before filing the motion. The Court of Appeal's only authority for this reversal was a civil rights case, in which the court was concerned with the overweening importance of vindicating highly valued constitutional rights. 561 F.2d at 618, *citing, Burns* v. *Thiokol Chemical Corp.,* 483 F.2d 300 (5th Cir. 1973). None of the compelling circumstances present in *Burns* are present here.

In short, the Court of Appeals had a slight of difference of opinion with the Trial Court and, except for its statements to the contrary, there is simply no authority for denominating this difference of opinion to be clear evidence of an abuse of discretion below.

II. This Court Should Review By Writ of Certiorari The Action Of The Court of Appeals In Totally Usurping The Trial Court's Exercise Of Its Sound Discretion Regarding The Conduct Of A Civil Trial And The Evidentiary Ruling Made Regarding An Improper Attempt At Impeachment.

In the second division of its opinion, the Court of Appeals invalidated the trial court's evidentiary ruling

which denied plaintiff's improper attempt to introduce inadmissible evidence under the ruse of "impeachment." Items 3 and 4 of the "Questions Presented for Review" delineate the issues raised by the appellate court's actions in that division. The specific factual situation is discussed above in the Statement of the Case. To reiterate, plaintiff attempted to "impeach" a witness by reference to hearsay, the hearsay being a document not authored by the witness but coincidentally bearing his name. Except for the Court of Appeal's erroneous factual conclusion, there has never been any contention in the trial of this matter that the witness was the author of the document which was to be used for "impeachment". Moreover, even had the witness been the author of that document, the exclusion of such a document would not be erroneous. It is contended that the Court of Appeals, in discussing the Federal Rules of Evidence, erroneously construed Federal Rule of Evidence 407, and also improperly intertwined the provisions of Rules 403 and 407.

In confusing the inter-relation of Federal Rules of Evidence 403 and 407, the Court of Appeals noted the advisory committee notes to Rule 407. Rule 407, it will be observed, excludes from admissibility evidence regarding "subsequent measures." However, as the text explicitly provides, and as the committee notes reflect, in certain instances the Rule merely ". . . does not require the exclusion . . ." of certain evidence. Federal Rule of Evidence 407. That exclusion is not required in some instances is not the same as affirmatively requiring admissibility in those instances. ". . . the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under

Rule 403." Notes of the advisory committee on Rule 407, Federal Rules of Evidence.

The Court of Appeals, noting that Rule 403 was interrelated in some context with Rule 407, erroneously concluded that the trial court's exclusion of evidence said to be offered for "impeachment" should be governed by the provisions of Rule 403. Even a superficial reading of Rule 403, however, shows that it provides for the exclusion, in some instances, of relevant evidence with some probative value, and the rule does not affect evidence which is offered merely for impeachment. It is a fundamental principle that evidence offered only for impeachment is not usually relevant to the issues sought to be proved at trial.

In addition to ignoring this principle, the Court of Appeals further ignored the factual context within which the so-called "impeachment" was attempted. The witness, a Mr. Saunders, was asked for his opinion "today" (i.e., the date of trial) regarding the safety of operation of "a John Deere Model 1020 tractor equipped with a Model 1200 back-hoe." The witness simply answered "yes". The next question propounded to Mr. Saunders simply added an additional condition: "Equipped with a rollbar?" The witness this time answered with a qualified statement: "Yes. If it is properly put on there." (T-412)

In this factual context, two pertinent points must be noted, although the Court of Appeals did not apparently consider them worthy of consideration. First, as the trial court noted (T-425-26) a statement of current opinion was not material ot the case; moreover, it can hardly be said that a simple statement of current opinion is contradicted by some unsigned document,

dated over one year prior to the statement of current opinion. It has been generally noted that impeachment as to collateral matters is not favored. *See, McCormick on Evidence,* 2d Ed., § 36. Moreover, the Federal Rules contemplate that the allegedly inconsistent statement must be by the witness, and not some third party. *See,* Rule 613, Fed. R. Evid. Simply stated, there was no foundation for "impeachment," and the Trial Court ruled properly.

Secondly, although the bulletins which were proffered as an item of "impeachment" (R-393, 394) were not authored by the witness sought to be impeached, those writings are not inconsistent with the witness's opinion. The witness's opinion was that the backhoe was safe, even on a tractor with a rollbar, ". . . if the backhoe was properly mounted. . ." (T-412) The documents in question (A-393-394) merely state that "IT IS POSSIBLE FOR A BACKHOE OPERATOR TO BE CRUSHED TO DEATH AGAINST THE ROLLBAR OR SAFETY CAB WHERE THE BACKHOE IS NOT RIGIDLY MOUNTED . . ." (A-493). Thus, it will be seen that the testimony of the witness is not inconsistent with the substance of the warning bulletin which was proffered for "Impeachment".

The Court of Appeals, in reversing a contended proper ruling by the trial court, totally failed to note the qualified nature of the witness's current opinion, and persisted in saying, erroneously, that the warning bulletins in questions had been sent by the witness, although this was clearly not the fact; the Court further misread this improper attempt at "impeachment" as an effort to confront the witness with "his own letter."

Thus, the Court of Appeals has misconstrued the provisions of Rule 407 affirmatively to require the

admission of any evidence offered under color of a claim of "impeachment," while the text of the rule merely states in clear terms that exclusion is not required; this error is compounded by the court's holding that a trial court's control over questionable evidence offered only for impeachment must be judged with the same strictures which circumscribe the trial court's power to exclude relevant evidence having probative value. Such a position is totally at variance with the clear text of the rule and should be corrected by this court.

These contended errors furnish ample reason for this Court to review the opinion of the Circuit Court of Appeals by writ of certiorari. Further, the necessity and importance of correcting imprecise interpretations and improper application of the still relatively new Federal Rules of Evidence would seem to mandate a review.

III. This Court Should Grant The Writ of Certiorari And Reverse The Opinion Of The Court of Appeals As The Court of Appeals In Reversing The Trial Court's Submission Of A Question Of Fact To The Jury, Totally Ignored Extensive Testimony Offered By The Plaintiff, Which Showed Questions Of Fact Contrary To The Positions Taken By Plaintiff: The Ruling Of The Court of Appeals Conflicts With A Decision Of Another Court of Appeals On The Same Matter.

As discussed above in the "Statement of the Case," a crucial issue at trial was whether a settlement document, executed by plaintiff, and a draft for $40,000.00 from a party's liability insurer, endorsed by plaintiff, operated as a release or a covenant not to sue. Under Georgia law, a release would legally extinguish a claim, while a covenant not to sue would allow the plaintiff

to proceed against any alleged joint tort-feasor not a party to the covenant.

Plaintiff executed an extensive, lengthy, and quite detailed agreement, and further negotiated a draft for $40,000.00 which was paid as a result of a claim made to the tractor dealership's liability insurer. The totality of circumstances so strongly suggested that the legal effect of these documents was a release that plaintiff, as a part of the case in chief, sought to negate this possibility. In so doing, plaintiff, plaintiff's counsel and a claims agent for the insurer making payment all testified upon direct examination during the plaintiff's case in chief. During this examination and the attendant cross-examinations, substantial evidence developed which showed without equivocation that, as to the liability insurer the payment of $40,000 was made as the result of the insurer's duty under a policy of liability insurance and that the claim was in no way treated as a loan.

Long, as defendant, was not a party to either the agreement or the draft endorsed by plaintiff. As such, in Georgia, Long, was not barred by the parol evidence rule from offering evidence controverting the collusive recitals of the documents between plaintiff and the third party defendant's liability insurer. *Knight* v. *Lowery,* 228 Ga. 452, 185 S.E. 2d 915 (1971). This general rule would logically allow a party to show that a collusive agreement, entered for the purpose of financing the litigation, cannot be construed solely by the self-serving recitals which the parties to the agreement put in. Such a position is not new and was long ago recognized by the Federal Courts. *See, O'Shea* v. *New York, C. & St. L.R. Co.,* 105 F.559 (7th Cir. 1901); *Page* v. *United Fruit Co.,* 3 F.2d 747 (1st Cir. 1925), *rev'd other grounds,* 274 U.S. 65, 71 L.Ed. 929,

47 S. Ct. 491 (1927). For some inexplicable reason, the Court of Appeals chose to ignore the wealth of testimony before the trial court. (T-189-208). The Court of Appeals also cited an applicable Georgia statute, but failed to apply the full language of the Statute. 561 F.2d at 620, *citing,* Ga. Code Ann. § 20-701. In its entirety, Ga. Code Ann. § 20-701 provides:

> "The construction of a contract is a question of law for the court. Where *any* matter of fact is involved (as the proper reading of an obscurely written word), the jury should find the facts." (emphasis added)

In construing this section, the courts of Georgia have explicitly noted that the intention of the parties in executing an agreement can be such a question of fact. *Pinkerton & Laws Co.* v. *Atlantis Realty, Inc.,* 128 Ga. App. 662, 666, 197 S.E.2d 749 (1973).

Moreover, the language of the settlement agreement obligated plaintiff to satisfy, without further consideration, any judgments against any party, if necessary, to insure that the liability carrier or its insured would never again pay any sums for plaintiff's claim. This is, in effect, an agreement not to enforce a judgment and is logically the same as a release. *See* Ga. Code Ann. § 39-604. In any event, evidence of the settlement or payment was admissable on the issue of damages. *Ford Motor Company* v. *Lee,* 237 Ga. 554, 229 S.E.2d 379 (1976). *See,* Ga. Code Ann. § 20-909. The Court of Appeals therefore erred in categorically ruling the evidence inadmissable.

Thus, the Court of Appeals ignored the applicable State law as well as contrary decisions of other Courts of Appeals. *O'Shea, supra.* In short, the Court of Appeals simply took at face value the self-serving and

collusive recitals of the document in question, notwithstanding the testimony of the parties thereto which belied the truth of those recitals. It is respectfully submitted that such a mere substitution of the appellate court's opinion for that of the trial court which heard the evidence and observed the witnesses, was unwarranted and cannot stand; this is especially true when the trial court, having the more immediate perspective, concludes that the matters should be resolved by the jury and an appellate court, isolated from the proceedings, is merely inclined otherwise.

In view of the applicable law of Georgia the opinion of the Court of Appeals should not be permitted to stand. As the instant opinion is in conflict with the decisions of other Courts of Appeals, and constitutes a decision of importance which is also in conflict with applicable state law, this is an appropriate case for this court to review on certiorari. *See,* Rule 19(b), Revised Rules of the United States Supreme Court.

CONCLUSION

For the reasons stated herein, it is submitted that this Court should issue the writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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APPENDIX

APPENDIX A

Sarah Helen Williams DOLLAR, Plaintiff-Appellant,

v.

LONG MFG., N. C., INC., Defendant and Third-Party Plaintiff-Appellee,

v.

NICHOLS TRACTOR COMPANY, INC., Third-Party Defendant.

No. 76-1018.

United States Court of Appeals, Fifth Circuit.

October 21, 1977.

Rehearing and Rehearing En Banc Denied November 30, 1977.

Before TUTTLE, MORGAN and HILL, Circuit Judges.

HILL, Circuit Judge.

This is a diversity action, arising in Georgia, alleging wrongful death. Plainitff-appellant Sarah Dollar appeals from a directed verdict and judgment entered against her in this products liability action for the death of her son, James Dollar. He was killed while operating a backhoe designed, manufactured and marketed by the defendant-appellee Long Manufacturing Company (Long). Defendant made the tractor dealer, Nichols Tractor Company, Inc., (Nichols) a third party defendant, seeking contribution or indemnity in the event of plaintiff's recovery.

The correctness of certain discovery and evidentiary rulings in the trial court prior to and during trial are the issues presented for decision. We reverse.

James Dollar, plaintiff's son, was an employee of the Decatur County, Georgia, government. On June 13, 1972, he was assigned to dig for and locate a water main in a local industrial park. He was to use a Long Model 1200

backhoe, a farming and industrial implement particularly suited for such a task. The backhoe was attached to a John Deere tractor equipped with a three point hitch. By activation of a control lever on the tractor, the three point hitch could be raised or lowered thereby raising or lowering the implement attached to the hitch. A canopy rollbar had been affixed to the tractor.

While digging to locate the water line on the morning of June 13th, James Dollar was killed when he was crushed between the control panel of the backhoe and the rollbar canopy of the tractor.

The plaintiff's son died before anyone arrived at the scene, and there were no eyewitnesses to the occurrence. The critical issue in the case became the cause of the backhoe's lifting off the ground causing the operator to be crushed between his control panel and the tractor's rollbar.

The plaintiff contended, *inter alia,* that the defendant was negligent in the design and manufacture of the product in that there was no adequate restraint to prevent the uplift of the backhoe; that, when a rollbar was attached to the tractor, an uplift of the backhoe off the ground would cause one in the operator's seat to be crushed against the rollbar; and that there was no warning against use of the backhoe with a tractor so equipped.

The defendant contended, *inter alia,* that the control lever of the tractor hitch had improperly been placed in an "up" position, thereby raising the backhoe into the rollbar. Plaintiff introduced expert testimony indicating the expected use of the backhoe in a digging operation would cause the back of the device, where the operator sat, to rear up. Thus was issue drawn, and the parties were without eyewitnesses.

I. *Gamesmanship and Discovery.*

During the course of discovery, plaintiff, by interrogatory, sought the following information from the defendant:

XXII

If you have knowledge of any accident, incidents, or occurrences resulting in the bodily injury or death of an operator of a backhoe of similar model to the one in this suit, please state:

(a) The number of such accidents, incidents or occurrences of which you have knowledge;

(b) The approximate dates of each such accident, incident or occurrence;

(c) The name and address of each person injured;

(d) A brief description of each accident, incident or occurrence, including specifically, how each injury or death was sustained;

(e) Whether suit was filed against you, and if so, the Court in which each suit was filed, and the date of its filing, and the disposition of each such suit.

The defendant responded as follows:

Without, in any manner, waiving its objections as to relevance, materiality and reasonable calculation to lead to the discovery of admissible evidence, and in the spirit of cooperation the defendant and third-party plaintiff responds to said interrogatory by stating that it has no present knowledge of any accidents, injuries or death resulting from the operation of the particular backhoe model in question ***prior to the incident which forms the subject matter of this litigation.*** (emphasis added).

Later, while taking the deposition of the defendant's design engineer, Max Saunders, the plaintiff discovered that there had been at least two such accidents subsequent to the death of plaintiff's son. However, acting upon advice of counsel, the agents of defendant, including the deposition witness, refused to reveal the details of these subsequent accidents.

The plaintiff, pursuant to Rule 37(a), Fed.R.Civ.P., moved the Court to compel the defendant to provide the information sought by the interrogatory. The Court without stating its reasons denied the plaintiff's motion.

On appeal, the plaintiff argues that the denial of the motion to compel was reversible error. We agree.

In our analysis, we start with the proposition that discovery ". . . together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). As the Supreme Court stated in the landmark decision of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947),

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pretrial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the

> parties to obtain the fullest possible knowledge of the issues and facts before trial.
> 329 U.S. at 500-501, 67 S.Ct. at 388-389.
>
> • • • • • •
>
> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. (footnotes omitted)
> 329 U.S. at 507, 67 S.Ct. at 392.

Rule 33 of the Federal Rules of Civil Procedure provides, in pertinent part, that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. Likewise, Rule 37(a)(3), Fed.R.Civ.P., provides that ,"an evasive or incomplete answer is to be treated as a failure to answer."

Discovery by interrogatory requires candor in responding. This is not to say that a party must answer every interrogatory put by his adversary. Indeed, the development of the multiple, memory, typewriter has producer "boiler plate" interrogatories often devised for such multiple issues that the propriety of any one question vis-a-vis the case at issue is chancy at best. The candor required is a candid statement of the information sought or of the fact that objection is made to furnishing the information. A partial answer by a party reserving an undisclosed objection to answering fully is not candid. It is evasive.

In the instant case, it is easily seen that the response to the plaintiff's interrogatory was evasive as well as incomplete. Counsel for defendant did not object to the interrogatory.[1] Rule 33 requires that the particular interrogatory be fully answered by the party or that objection to it and the grounds of objection be stated. A unilateral declaration that no objections are waived will not be allowed to displace the command of Rule 33 that the party either answer fully or object. Defendant did neither.

Therefore the trial judge erred in refusing to compel the defendant to answer the interrogatory. By failing to object, defendant waived any objections it might have had to the giving of a full answer to the interrogatory. Likewise, since an evasive or incomplete answer is equated with failure to answer, the defendant did, under the law, fail to answer, thus waiving any objections to the interrogatory.

There is an additional reason why the trial court should have compelled the defendant to answer that part of the interrogatory evaded.

Rule 26(b)(1) states the general rule with regard to the scope of discovery.

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought

[1] An objection would have revealed that the answer given was evasive.

> appears reasonably calculated to lead to the discovery of admissible evidence.

The information sought by the plaintiff as to the existence and details of other injuries and deaths resulting from the use of Long backhoes of the 1200 model and other similar models clearly was "reasonably calculated to lead to the discovery of admissible evidence." While an accident occurring after the one under investigation might not have been relevant to show defendant's prior knowledge or notice of a product defect, it may have been highly relevant to causation, the critical issue in this case. Indeed, this Court has held that when causation is an issue, provided a proper foundation has been laid, evidence of subsequent accidents may be admissible to prove causation and to rebut the opposing party's causation theory. *Bailey* v. *Kawasaki-Kisen, K. K.*, 455 F.2d 392 (5th Cir. 1972). Thus, the information sought by the interrogatory may well have constituted admissible evidence. Upon retrial, we leave it to the trial court to make this determination. Since the evidence of subsequent accidents may have been admissible, *a fortiori* the information sought by the interrogatory was "reasonably calculated to lead to the discovery of admissible evidence." The events in this trial fully disclose how such an occurrence may have led to the discovery of admissible evidence. Plaintiff's expert witness sought to reproduce the physical events causing the backhoe to raise up from the ground. The mere fact that his observations came from manipulation of the equipment *subsequent to* the incident investigated did not serve to make them objectionable. If there were (and the record indicates that there were) other occasions upon which the movement had taken place, observations made then might well have established the proof of what happened on the unobserved occasion at issue here.

The trial court erred in protecting defendant from making full answer to the interrogatory. No one objected to it.

It was reasonably calculated to lead to the discovery of relevant facts.

III. *Release or Covenant not to Sue?*

In his third enumeration of error, plaintiff argues that the trial court erred by submitting to the jury, as evidence of a release, an agreement entered into between the plaintiff, on the one hand, and Nichols Tractor Co. (the tractor dealer), John Deere Tractor Co. (the manufacturer of the tractor), and John Deere Insurance Co. (the insurance carrier for the dealer and manufacturer).

Prior to the trial, an agreement was negotiated whereby, in exchange for a $40,000 loan without interest, repayable by specified formula only upon recovery against the defendant, plaintiff agreed "to forbear to sue Nichols, John Deere and the Insurance Company to forever save Nichols, John Deere and the Insurance Company harmless as hereafter provided." Other relevant sections of the agreement provided as follows:

6.

> While the $40,000 referred to herein is a loan to be repaid only from proceeds that may be recovered by Mr. and Mrs. Dollar in subsequent litigation against Long Manufacturing Co., Inc., it is the intent of the parties that Nichols, John Deere and the Insurance Company nor any person, firm or corporation acting on behalf of Nichols, John Deere and the Insurance Company and no person, firm or corporation for whose actions Nichols, John Deere and the Insurance Company might be responsible, shall ever again be called upon to respond in damages as a result of the accident or occurrence hereinabove referred to and in which Mr. and Mrs. Dollar's son was fatally injured. In consideration of the loan without interest as herein referred to, Mr. and Mrs. Dollar agree if necessary

> to protect such persons intended to be protected hereby from further liability, that Mr. and Mrs. Dollar will promptly execute a full and complete release or enter a complete satisfaction of any judgment, execution of fi. fa. without payment from any source whatever. Further, when the litigation hereinbefore referred to with Long Manufacturing Co., Inc. is concluded either in the form of settlement on a release given by Mr. and Mrs. Dollar, or at the rendition of a final judgment therein, or in any other fashion or manner whatever, Mr. and Mrs. Dollar agree to execute a full and complete release in favor of all parties making this loan possible and for all other persons for whose actions said parties may be liable.

7.

> It is not the intent of this agreement that the same be a release.

Accordingly, a check for $40,000 was issued by John Deere Insurance Co. to the plaintiff and her counsel. On the back of the check appeared the following language:

> Endorsement hereof acknowledges that this payment is offered and received in full satisfaction of the claim(s) identified on the other side; and that upon acceptance and payment of this draft the John Deere Insurance Company is hereby released and discharged of said claims.

Under Georgia law, the release of a joint tort-feasor operates to release all other joint tort-feasors. *Knight v. Lowery*, 228 Ga. 452, 185 S.E.2d 915 (1971).

The defendant at trial was successful in persuading the trial judge to admit the loan agreement and check into evidence so that the jury could decide whether or not the plaintiff had released a joint tort-feasor and hence the defendant.

The plaintiff contends that the trial court erred, asserting that, as a matter of law, there was no release of a joint tort-feasor, only a covenant not to sue. We agree.

At the outset, we examine the loan agreement. Clearly it is not a release, but rather, a covenant not to sue with related indemnity provisions. It expressly states that the intention of the parties is that it not constitute a release. Furthermore, the section provided for the plaintiff to release the parties to the agreement in the event it became necessary clearly is in contemplation of conditional future action and hence belies the assertion that the agreement is a release.

Likewise, the acceptance of the check by the plaintiff did not operate to release any joint tort-feasor from liability. By its express terms, the release language on the back of the check purported to release only John Deere Insurance Company from the claim identified on the front of the check. The insurance company, whose liability to the plaintiff rested solely upon its contractual undertakings in the agreement, can hardly be contended to be a joint tort-feasor. The claim referred to on the face of the check was the claim created by contract between plaintiff, Nichols, John Deere and the Insurance Company when they entered into their loan agreement and covenant not to sue. It was not any claim plaintiff might have arising out of the addition of the rollbar to the tractor or other such possible claim in connection thereof. Thus, the trial judge erred in two respects. In admitting the documents into evidence for the jury's consideration, he erred since the issue of the interpretation of a contract is one for the Court, not the jury. Ga.CodeAnn. § 20-701. Secondly, the Court should have held as a matter of law that the documents did not constitute a release of a joint tort-feasor.

The plaintiff submits additional grounds alleged to constitute reversible error. We need not pass on these. A discussion of them would not aid the District Court in the event of retrial.

REVERSED and REMANDED.

APPENDIX B

Federal Rule of Evidence 403 provides:

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 407 provides:

SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Federal Rule of Evidence 613 provides:

PRIOR STATEMENTS OF WITNESSES

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless

the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Ga. Code Ann. § 20-701 provides:

20-701 (4265) By whom contracts construed

The construction of a contract is a question of law for the court. Where any matter of fact is involved (as the proper reading of an obscurely written word), the jury should find the fact.

Ga. Code Ann. § 20-909 provides:

20-909 (4308) Covenant not to sue. Indemnity bond

A covenant never to sue is equivalent to a release; so also is a bond to indemnify the debtor against his own debt.

Ga. Code Ann. § 39-604 provides:

39-604 (6050) Contract not to enforce execution, effect of

An agreement for a valuable consideration never to enforce a judgment or execution shall release the judgment or execution.